L. M. Settles Construction Co., Inc. *and* Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO. Case 7-CA-17873

November 24, 1981

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On June 29, 1981, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, brief, and brief in opposition, and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein,[2] and to adopt his recommended Order.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the Administrative Law Judge's Conclusion of Law:

"4. By refusing to furnish Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, or its agents, for an audit, its books and record of original entry, including its general ledger, for the period September 1, 1979, to the date of completion of the audit, the Employer has refused to bargain collectively with the Union, in violation of Section 8(a)(5) and (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, L. M. Settles Construction Co., Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge: This case was heard before me on March 13 and May 27, 1981, in Detroit, Michigan.

Upon an original charge filed on June 9, 1980,[1] by Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO (the Union), the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on July 30.

In essence, the complaint alleges that L. M. Settles Construction Co., Inc. (the Employer), refused to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act), when it refused the Union's May 9 request to conduct a comprehensive audit of its financial records, including its general ledger, which, the complaint claimed, was needed to enable the Union to police the Employer's administration of a collective-bargaining agreement between the parties.

The Employer filed a timely answer, filed a written amendment thereto, and made a further oral amendment at the hearing which admitted certain matters but denied the substantive allegation and that it committed any unfair labor practices.

All parties appeared at the hearing. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and meet material evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. Counsel for the General Counsel and the Union's counsel argued orally. In addition, the Employer's counsel and the Union's counsel filed briefs on June 8 and 15, 1981, respectively. I was administratively advised that the General Counsel would file no brief. I have carefully considered the oral arguments and the contents of the briefs submitted.

Upon consideration of the entire record, the arguments, and the briefs, and from my observation of the single witness and his demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Based upon the Employer's answer, as finally amended, there is no issue as to jurisdiction or labor organization status.

The Employer, a Michigan corporation, has maintained its office and place of business in Livonia, Michigan, where it has been engaged in the drywall construction business.

At all material times, the Employer has been a member of the Michigan Dry Wall Contractors Association, Inc. (the Association), which is comprised of em-

[1] In adopting the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to permit the Union to examine its financial records, including its general ledger, for the purpose of conducting a comprehensive audit, we agree with his finding that deferral to arbitration is inappropriate herein because the audit authorization provisions for fringe benefit payments contained in art. XVIII are explicitly exempt from the grievance and arbitration provisions of art. XX of the parties' agreement. Accordingly, we find it unnecessary to rely on the Administrative Law Judge's further grounds for declining to defer this matter to arbitration.

[2] We will modify the Administrative Law Judge's Conclusions of Law to conform more fully with his recommended Order.

[1] All dates hereinafter are in 1980 unless otherwise stated.

ployers engaged in the drywall construction industry and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

During the calendar year immediately preceding issuance of the complaint, the various members of the Association generated gross revenues in excess of $500,000. During the same period of time, the members of the Association purchased goods and supplies valued in excess of $50,000 from various suppliers which, in turn, purchased such goods and caused them to be transported and delivered to their Michigan facilities directly from points located outside Michigan.

Upon all the foregoing, I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The material facts are undisputed. They are a composite of the testimony of the sole witness, Michael G. Maher, administrative assistant to the Union's fringe benefit funds, and supporting documentary evidence.[2]

(The Employer objected to some of Maher's testimony regarding what was reported to him by employee Chandler as hearsay. The Employer argues I should draw adverse inferences regarding what apparently emanated from Chandler because he was present at the hearing, but was not called to testify. I decline to make such inferences because the documentary evidence fully supports and confirms all matter which Maher attributed to Chandler. In all other respects, Maher's testimony stands uncontradicted. The Employer rested without calling any witness to testify in its behalf).

At all material times, the Employer, as a member of the Association, has been a signatory to a collective-bargaining agreement between the Union and the Association. At the time of the events relevant herein, the Employer was bound to such a collective-bargaining agreement in effect until May 31, 1980.

In material part, the collective-bargaining agreement (art. XVIII) provides for the Employer to make regular contributions to the Union's deposit fund to cover the fringe benefit package contained in said agreement. The amount of such contribution is based on the number of hours worked by each employee covered by that agreement.

The funds contributed by Association members is administered by trustees of Painters Union Deposit Funds (the Trustees). Article XVIII, section 2, contains the employer-members' authorization for "any accountant selected by the Trustees . . . to make regular audits of . . . [their] . . . payroll records to ascertain whether . . . [they have] . . . complied with the requirements" of the collective-bargaining agreement. Additionally, the audit authority provides for "any accountant selected by the Trustees . . . to have access to, and to inspect any and all books, records, accounts, ledgers, and records of original entry, for the purpose of determining whether or not the Employer has conformed with" its obligations to make fringe benefit contributions. Finally, the provision for regular audits specifies "such inspection shall be made only on an express order of the . . . Trustees."

On or about July 18, 1979, the Union conducted a regular audit (apparently pursuant to the contractual provisions quoted above) of the instant Employer's books and records. At that time, employee Chandler was not working for the Employer.[3]

Chandler started work for the Employer in a classification covered by the collective-bargaining agreement during the second week of September 1979. The Employer issued a check, dated September 14, 1979, to Chandler for $210. Because the Employer had not yet received Chandler's withholding authorizations, that check represented his gross wages.[4]

Sometime in November 1979, Chandler showed Maher a copy (or original)[5] of the $210 check. Chandler told Maher he believed other employees had been paid the "same way."

In Maher's experience, he occasionally found employers had circumvented their obligation to make fringe benefit contributions by making wage payments to employees from funds held in other than payroll accounts. Such payments had been made by issuance of so-called side checks. Thus, upon seeing Chandler's $210 check, Maher became suspicious that the Employer might be seeking to avoid its contractual obligations. Accordingly, Maher examined the Employer's contribution report forms. He concluded that the $210 check was drawn upon the Employer's general account by noting that the check was of the same kind which was used by the Employer to send its fringe benefit contributions to the Union.

On or about January 23, 1980, Maher reported to the trustees. He explained the existence of a possible breach of the Employer's obligation to contribute to the fringe benefit funds. The trustees ordered Maher to conduct a full comprehensive audit, including the books of original entry of the Employer.

By letter dated January 23, dispatched by regular mail, Maher wrote the Employer he had been instructed by the Trustees "to conduct a full Comprehensive Audit of all your records, and books of original entry, for the period January 1, 1978, to the date of completion of this Audit." Maher's letter asked the Employer to contact him within 5 days to arrange the audit. Maher received no response.

On February 6, Maher dispatched another letter by certified mail to the Employer. Its terms were identical to the January 23 letter. The February 6 letter was returned to Maher marked "Unclaimed."

[2] Maher testified on behalf of the General Counsel.

[3] It is not asserted that this audit revealed any deficiency in the Employer's contributions.

[4] Chandler did not negotiate the check. It was later replaced by the Employer with a payroll check representing Chandler's net wages after appropriate withholding deductions.

[5] Maher was unsure whether he saw the original. I do not consider this significant.

On March 3, Maher once again dispatched his February 6 letter, this time by regular mail.

On March 21, Maher wrote the Employer. He referred to his letters of January 23 and February 6. The March 21 letter states, in relevant part, that the trustees "have given express orders for . . . . [Maher] . . . to conduct a full Comprehensive Audit of all your records, and books of original entry, for the period January 1, 1978 to December 31, 1979." Maher asked the Employer to contact him within 5 days to arrange for his examination of the records. The March 21 letter ends with the admonition that the Employer's failure to comply would result in Maher's request of the trustees for them to file unfair labor practice charges.

The Employer's president, Louis Settles, telephoned Maher around March 25 or 26. Settles asked Maher what he was seeking. Maher requested production of specific material, including the general ledger. Settles said he needed more time to consider the request.

Sometime later, Settles contacted Maher. They arranged for Maher to examine the Employer's books at Settles' office on May 9.

On May 9, Maher, together with a field auditor, met with Settles. Settles was presented with a copy of Chandler's $210 check. Settles explained that no deduction authorization form had been received by the Employer at the time that check had been issued. Settles also told Maher that check had not been cashed and was replaced with the Employer's payroll check.

Settles then gave Maher some of the records he requested. Specifically, Maher examined certain quarterly reports and individual payroll summaries. Maher asked to examine the Employer's general ledger. Settles declined to produce it.

Maher completed his examination of the records provided. He verified that all fringe benefits for Chandler and all other employees reported by the Employer to the Union's funds appeared consistent with the Employer's payroll summaries. Nonetheless, Maher repeated his request to examine the general ledger. Settles said he would have to think about whether he would produce the general ledger and would "get back" to Maher.

Maher credibly testified, and was unshaken during cross-examination on this issue, that without studying the general ledger he could not determine whether any "side" check had been issued to any employee. Maher further testified that the fringe benefit contribution forms, alone, would not necessarily reflect that an employer had made contributions for all hours worked. Those forms comprise a self-serving declaration by an employer of whatever number of hours worked the employer desires to place thereon.

About 2 weeks later, Maher and Settles spoke. Maher asked to see the general ledger. Settles said he decided not to deliver it.

Shortly thereafter, Maher reported to the trustees that Settles refused access to all the books and records and that the comprehensive audit was not completed. The trustees concluded they needed the general ledger to determine whether any employee had been issued a "side" check. The trustees directed Union Attorney Gold to pursue the issue. This resulted in the filing of the charge underlying the instant Complaint.

B. *Analysis*

The General Counsel and the Union contend the comprehensive audit, including the Employer's general ledger, is necessary and relevant to the Union's performance of its collective-bargaining obligations. As to necessity, they claim the general ledger, specifically, is needed to ascertain whether the Employer's fund contribution report forms accurately reflect all payments made to employees. Thus, if the general ledger were to reveal no side checks had been issued to employees, that would indicate the Employer fulfilled its fringe benefit obligations. On the other hand, if the general ledger reveals such side checks had been issued, the Union might decide to take appropriate action to enforce the contract.[6]

The Employer contends (1) no *prima facie* case has been established, and (2) the Board should defer to arbitration. The Employer claimed the General Counsel "must establish . . . [the Union] . . . held a reasonable belief that it will discover contract violations from the information requested."

I agree with the position taken by the General Counsel and the Union.

1. Relevance and necessity

The Employer asserts the evidence reflects the Union had only a speculative hint of any contract violation. As such, the Employer contends a *prima facie* case had not been established.

I find the facts show the Union had cause to believe the Employer breached its contractual obligation to make fringe benefit contributions. Thus, Maher was presented with Chandler's side check. This, alone, was a sufficient basis to doubt the accuracy of the information submitted by the Employer on its fringe benefit contribution reports.

Additionally, Maher was informed other employees had been paid the same way. Though literally hearsay, that information buttressed and enhanced his doubts.

The trustees then acted responsibly in ordering the comprehensive audit. That order set in motion the machinery by which the Union could obtain information by which it could determine whether a contract breach was present.

It is well established that a labor organization, obligated to represent employees in a bargaining unit with respect to their terms and conditions of employment, is entitled to such information from the employer as may be relevant and reasonably necessary to the proper execution of that obligation. *Vertol Division, Boeing Company*, 182 NLRB 421 (1970); *N.L.R.B.* v. *Whitin Machine Works*, 217 F.2d 593 (4th Cir. 1955), cert. denied 349

[6] Art. XX of the relevant collective-bargaining agreement establishes an extensive grievance and arbitration procedure "whenever a dispute arises between . . . [the parties] . . . concerning the carrying out of this agreement." However, as will be shown in subsec. II,B,2, *infra*, the subject of fringe benefit contributions is expressly excluded from operation of the grievance and arbitration procedure.

U.S. 905. The right to such information exists not only for the purpose of negotiating a contract, but also for the purpose of administering a collective-bargaining agreement. The employer's obligation, in either instance, is predicated on the need of the union for such information in order to provide intellignt representation of the employees. *F. W. Woolworth Company*, 109 NLRB 196, 197 (1954), enfd. 352 U.S. 938 (1956).

The test of the union's need for such information is simply a showing of "probability that the desired information was relevant, and that it would be of use to the Union in carrying out its statutory duties and responsibility." *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, 437 (1967).[7] The union need not demonstrate that the information sought is certainly relevant or clearly dispositive of the dispute between the parties. The fact that the information is of potential relevance is sufficient to give rise to an obligation on the part of an employer to provide it. *The Brooklyn Union Gas Company*, 220 NLRB 189 (1975).

The appropriate standard in determining the potential relevance of information sought in aid of a bargaining agent's responsibility is a liberal discovery-type standard. *Acme Industrial, supra.*

Herein, the evidence reflects the Employer granted the Union access to a variety of records and reports on May 9. Nonetheless, I conclude that the material produced was insufficient to permit a fair and complete evaluation of the Employer's compliance with its contractual obligation to make fringe benefit contributions. Indeed, the Employer's denial of the general ledger constitutes a reservation to the Employer of the right to satisfy the legal standard upon its unilaterally determined standard of relevance. Such usurpation is contrary to the Employer's agreement, article XVIII, which grants the trustees the right to conduct audits. Moreover, such a reservation is impermissible under Board law. *L & M Carpet Contractors, Inc.*, 218 NLRB 802, 804 (1975). In *L & M*, as herein, an employer submitted some but not all, of the records requested by the auditor. The Board left undisturbed the administrative law judges' finding that the employer refused to bargain in violation of Section 8(a)(5) and (1) by failing or refusing to provide access to *all* the records, including the general ledger.

The question of relevance is properly for the Board's determination. In *Acme Industrial, supra*, the Court noted (385 U.S. at 435–436):

> There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149. . . . The only real issue in this case, therefore, is whether the Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights.

I find the contents of the general ledger presumptively relevant to the Union's collective-bargaining functions herein. *Murray Bagdasorian d/b/a Michael Rossi Carpet Co.*, 208 NLRB 748, 753 (1974); *Michigan Drywall Corporation, M & D Drywall, Inc., and James F. Mullins*, 232 NLRB 120 (1977). This is so because production of the Employer's general ledger would have permitted the Union to compare payments made by the Employer to employees (if such payments appear in the general ledger) with the hours worked which were reported by the Employer on its fringe benefit contribution reports; or the Union would have discovered that no such side payments had been made. To deprive the Union of this ability to make such a comparison effectively vitiates its collective-bargaining obligation to police implementation of the collective-bargaining agreement. *Ellisworth Sheet Metal, Inc.*, 224 NLRB 1506, 1509 (1976), reaffirmed 232 NLRB 109 (1977).[8]

The Supreme Court commented upon the efficacy of such purpose. Though *Acme Industrial* arose in the context of a union's need for information to determine whether it should proceed with a grievance, the legal principles and rationale derived from that opinion are apposite herein. Thus, the Court noted (385 U.S. at 437–438):

> When the Respondent furnishes the requested information, it may appear that . . . the grievances filed are without merit. On the other hand, even if it appears that such activities have taken place, an arbitrator might uphold the contention that no breach of the agreement occurred. . . . Such conclusions would clearly not be precluded by the Board's threshold determination concerning the potential relevance of the requested information.

The Employer urges the Union was engaged in a fishing expedition. It claims there is "no real evidence to suggest [the presence] of a violation of the coutract." I conclude this argument begs the question. The very purpose of the Union's requested audit was to enable it to determine whether a contract violation was present. That purpose, in my opinion, satisfies the Court's recognition that relevancy is a threshold question for the Board's determination.

As previously quoted, the standard for such determination is satisfied by showing a "probability that the desired information was relevant, and that it would be of use to the Union in carrying out its statutory duties and responsibilities." 385 U.S. at 437. I conclude the existence of Chandler's side check, coupled with Maher's experience that other employers had used side checks as a means to avoid their fringe benefit obligations, comprised sufficient probability the instant Employer might be avoiding its contractual commitment.

I have already discussed, and concluded, the general ledger could have been used by the Union to promote its statutory responsibilities. Moreover, the Court strongly encouraged the use of the earliest opportunities to deter-

[7] This case is cited by both the Union and the Employer.

[8] The fact that Chandler's check was not negotiated by him does not render moot the need to audit. Maher had been apprised of the possibility other employees had been given side checks. If so, there is no evidence to suggest such checks also had not been negotiated. Thus, the only sure way to conclude the issue was by an examination of the Employer's books of original entry—specifically, its general ledger.

mine whether the Union had an actionable claim. Thus, the Court observed (385 U.S. at 438): "Arbitration can function properly only if the grievance procedures leading to it can sift out meritorious claims." I have already observed this is one of the possible results of the Employer's compliance with the request for the comprehensive audit, including the general ledger.

Upon all the foregoing, I find the General Counsel has sustained the burden of proving the comprehensive audit of the Employer's records, including the books of original entry and general ledger, are relevant and necessary to the Union's performance of its collective-bargaining obligations. Because the Employer admittedly did not furnish the general ledger, I further find that neglect violated Section 8(a)(5) and (1) of the Act, as alleged.

2. Arbitrability

As noted, the Employer urges the Board to defer the issues to the arbitration provisions of the collective-bargaining agreement.

The General Counsel asserts deferral is inappropriate because grievances relating to the fringe benefit funds are expressly exempt from application of the grievance and arbitration provisions of article XX of the parties' agreement.

The agreement, article XX-H, declares, "Article XX shall not apply to disputes arising between the Union and an Employer concerning Article XVIII hereof."[9]

I conclude there is no merit to the Employer's position that "the grievance procedure would settle the present dispute." Patently, the instant controversy is expressly excluded from operation of the grievance and arbitration procedure.

Moreover, the Board will not apply its deferral principles *Collyer* (*Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971)) unless the contractual grievance and arbitration provision at least arguably encompasses the type of dispute in question. *Urban N. Patman, Inc.*, 197 NLRB 1222 (1972). Accordingly, I agree with the General Counsel.

If my conclusion that the grievance and arbitration provisions are inapplicable to the instant issue is imprudent, there exists yet another reason to decline to defer. Thus, in my view, the Employer's suggestion to defer restricts the parties in the statute's quest for maintenance of labor-management stability. The Employer's proposal requires recourse to the intricate grievance and arbitration machinery of article XX. That procedure involves an informal hearing, a possible investigation, a formal hearing, and, finally, binding arbitration before an impartial arbitrator.

It is clear that production of the requested information may well serve to cause the Union to abandon any such recourse if it should be satisfied, from an examination of the requested records, that the Employer has fulfilled its contractual fringe benefit obligations.

The Supreme Court, in *Acme Industrial*, declared (385 U.S. at 438): "[I]f all claims originally initiated as grievances had to be processed to arbitration, the system would be woefully overburdened." I conclude the Employer's position would foster such a result.

In any event, as I have found the withholding of the requested records has eliminated the Union's ability to assess whether a contract breach existed, it would not be possible to utilize either the grievance and arbitration procedure or any other legal means, for no facts exist which give rise to a grievance or any other legal action based on the failure to pay the required fringe benefit contributions. The source of such facts has been obscured by the Employer's unlawful refusal to deliver the general ledger.

It is unclear just what subject matter the Employer would have subjected to the grievance and arbitration provisions. If it is the Employer's failure to have complied with the request for a *comprehensive* audit which should be grieved, the exclusion of article XX-H would prevent such a grievance because the audit authority is contained in article XVIII. Thus, the Employer's proposal effectively eliminates all remedial possibilities.

Upon the foregoing, I find no merit in the Employer's contentions regarding deferral.

Upon the basis of the foregoing findings of fact, conclusions, and the entire record, I make the following:

CONCLUSIONS OF LAW

1. L. M. Settles Construction Co., Inc., is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. All of the Employer's employees covered by the collective-bargaining agreement between the Union and the Michigan Dry Wall Contractor Association, Inc., scheduled to terminate on May 31, 1980, constitute a unit of employees appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act.

4. By failing to permit the Union to conduct a full comprehensive audit of its records, including its general ledger and other books of original entry, in accordance with the Union's various requests between January and May 1980, the Employer refused to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of the Act.[10]

THE REMEDY

Inasmuch as I have found the Employer refused to bargain with the Union by declining to permit the full comprehensive audit, I shall order the Employer to cease and desist from engaging in such unfair labor practice

[9] Art. XVIII is entitled "Painters Union Deposit and Other Trust Funds." As noted, this article, *inter alia*, establishes the Employer's obligation to make fringe benefit contributions and gives the Union the right to audit.

[10] I reserved ruling upon the Employer's oral motion to dismiss the complaint allegations. Based upon the aforesaid conclusions of law, the Employer's motion is hereby denied.

and affirmatively take such actions as will dissipate the effects of its unfair labor practice.

The Order shall require the Employer to permit the Union fund trustees, or their designees, to conduct the comprehensive audit requested between January and May 1980, and to produce for such purpose to the Union all records, including its general ledger and other books of original entry, for the Union's examination.

The Union requested the period to be covered by its audit begin on January 1, 1978, and encompass the intervening time until the date the audit is complete. In my opinion, the record does not support such an extensive undertaking. Maher testified the Employer had been audited for the first 6 months of 1979. Although the extent of that audit was not fully developed, there is evidence the Union had been satisfied of no improprieties. It was not until Chandler began working in September 1979 that the facts show the Union had any cause to question the Employer's activities. Though I am mindful of the possibility the Employer might have been derelict before Chandler began to work, the state of the record provides little, if any, evidence to justify the breadth of the Union's request. Accordingly, I shall order the Employer to submit its general ledger and other books of original entry for audit only for the period beginning with September 1, 1979, to the date of its completion.

The Union has requested a variety of remedial provisions such as a "make-whole" remedy, a requirement that the Employer pay interest upon whatever deficiencies are uncovered by the audit ordered, and enforcement of the contractually mandated liquidated damages provision.[11]

As to the request for a make-whole remedy, the Employer resists, claiming, in effect, such a remedy is inappropriate because it places the Board in the posture of having gone beyond the limits of *Acme Industrial* by rendering a decision on the merits of the underlying dispute. Thus, the Employer argues the Supreme Court held, in *Acme Industrial*, the Board appropriately considered only the threshold issue of the relevance and necessity of the information sought.

I find merit to the Employer's position. The complaint before me does not allege the Employer refused to bargain by a failure to pay the fringe benefit contributions. In each of the cases cited by the Union in support of its make-whole request, the Board had before it the specific issue that an employer refused to bargain by having failed to make the contractually required fringe benefit payments. See, e.g., *H & R Contracting Corp.*, 255 NLRB 491 (1981), failure to pay contributions; *Tolmich, Inc. d/b/a Orange County Metal Processing*, 252 NLRB 1269 (1980), discontinuance of health and welfare payments; *Memley Plating Company*, 252 NLRB 1264 (1980), failure to transmit dues; *Allen Materials, Inc., Debtor-In-Possession*, 252 NLRB 1116 (1980), termination of health and welfare contributions; *Ace Masonry, Inc.*, 252 NLRB 287 (1980), unilateral discontinuance of fringe benefit payments; *William Minter Masonry Contractor, Inc.*, 252 NLRB 130 (1980), discontinuance of trust fund payments; and *V. Pangori & Sons, Inc. and David Cuvrell, Receiver in Bankruptcy*, 248 NLRB 405 (1980), discontinuance of fringe benefit payments.

Thus, I find each of the above-cited cases contain material distinctions from the case at bar. The instant complaint and litigation before me does not go so far as those cases. I have been required to resolve only the Union's right to information. This involves consideration only of the threshold issues to which the Supreme Court alluded in *Acme Industrial*. I have done so. To do more would not only wreak an injustice upon the Employer, but would effectively conclude an issue which clearly was not, and had not been contemplated to be, litigated. Accordingly, the Union's make-whole request is denied.

With respect to the request for liquidated damages, there is a collective- bargaining provision covering that subject. Thus, article XVIII, section IV, provides "that the damages which will result from the failure of an Employer to pay his fringe benefit contributions on time, or in the correct amount, are difficult to calculate with any certainty and, therefore, any Employer who fails to make payments to the funds, in accordance with this Agreement, shall pay as liquidated damages, in addition to the contribution due: Delinquency for 1–15 days—5 percent of monthly contribution; Delinquency for 15–30 days—10 percent of monthly contribution; Delinquency for 30–45 days—20 percent of monthly contribution."

The Employer does not address this specific issue.

In *Finger Lakes Plumbing & Heating Co., Inc.*, 254 NLRB 1399 (1981), the Board reaffirmed its Order (253 NLRB 406 (1980)) based on the charging party's exceptions to an administrative law judge's omission to order payment of contractually mandated liquidated damages for failure to pay fringe benefit fund contributions. Thus, the Board ordered such was an appropriate remedy.

Finger Lakes contains the same distinction noted above in the cases dealing with a make-whole remedy. The Board's liquidated damage order was predicated upon the Board's finding of an unfair labor practice in the Employer's unlawful discontinuance of fringe benefit payments. In the absence of such a finding in the case at bar, I deny the request for payment of the contractual liquidated damages.

Regarding the request for a provision for the Employer to pay interest upon moneys the Employer may owe the fringe benefit funds, it is hereby denied for two reasons. First, all the cases which my research has uncovered in which interest was even considered by the Board were based on a finding by the Board that such moneys actually were due, which finding, in turn, was based on a complaint of the General Counsel alleging that the failure to make such payments constituted an unfair labor practice. As noted above, the instant complaint contains no such allegation. Second, the Union's request is, in any event, premature. Thus, in *Allen Materials, Inc., supra*, the Board commented, in footnote 2, that it "does not provide at the adjudicatory stage of the proceeding for addition of interest at a fixed rate on unlawfully withheld fund payments." The Board left the matter to the compliance stage. See also *Merryweather Optical Company*, 240 NLRB 1213 (1979).

[11] The General Counsel did not address the scope of the remedy.

Finally, the Order shall require tne Employer to refrain from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

Upon the above findings of fact, conclusions of law, the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[12]

The Respondent, L. M. Settles Construction Co., Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to furnish Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL–CIO, or its agents, for an audit, its books and record of original entry, including its general ledger, for the period September 1, 1979, to the date of completion of the audit.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the free exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Furnish to Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL–CIO, or its agents, for inspection and examination, all records necessary, including its general ledger and other books and records of original entry, for said labor organization to make a comprehensive audit under article XVIII of the parties' collective-bargaining agreement.

(b) Post at its Livonia, Michigan, location, and at any other central location to which the Employer's employees in the bargaining unit found appropriate herein regularly report, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT refuse to furnish Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL–CIO, or its agents, our general ledger and other records and books of original entry, for auditing purposes, from September 1, 1979, to the date said labor organization conducts a comprehensive audit which began on May 9, 1980.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the free exercise of the rights set forth at the top of this notice.

L. M. SETTLES CONSTRUCTION CO., INC.

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."